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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF ALAMEDA**

12 CA CITIZEN PROTECTION GROUP,
13 LLC,

14 Plaintiff,

15 vs.

16
17 1616 HOLDINGS, INC.; FIVE BELOW,
18 INC.; and DOES 1 to 50,

19 Defendants.

CASE NO.

20 **COMPLAINT FOR INJUNCTIVE**
21 **RELIEF AND CIVIL PENALTIES**

[Violations of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (*Health & Safety Code* §§
25249.5, *et seq.*)]

22 UNLIMITED CIVIL
23 (exceeds \$35,000)

24 Plaintiff CA CITIZEN PROTECTION GROUP, LLC (“CCPG” or “Plaintiff”)
25 brings this action in the interests of the general public pursuant to California’s Safe
26 Drinking Water and Toxic Enforcement Act of 1986, codified as Cal. Health & Safety
27 Code (“HSC”) § 25249.5 *et seq.* and related statutes (also known and referred to herein as
28 “Proposition 65”) and, based on information and belief, hereby alleges:

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I
THE PARTIES

1. Plaintiff CCPG is dedicated to, among other causes, reducing the amount of chemical toxins in consumer products, the promotion of human health, environmental safety, and improvement of worker and consumer safety.

2. Plaintiff is a person within the meaning of HSC § 25249.11(a) and brings this enforcement action in the public interest pursuant to HSC § 25249.7(d).

3. Upon information and belief, Defendant 1616 HOLDINGS, INC. ("1616"), is a Pennsylvania corporation, and a person doing business in the State of California within the meaning of HSC §25249.11(b) and had ten (10) or more employees at all relevant times.

4. Upon information and belief, Defendant FIVE BELOW, INC. ("Five Below"), and together with 1616, collectively referred to as "Defendants", and each is a "Defendant"), is a Pennsylvania corporation, and a person doing business in the State of California within the meaning of HSC §25249.11(b) and had ten (10) or more employees at all relevant times.

5. Defendants own, administer, direct, control, and/or operate facilities and/or agents, distributors, sellers, marketers, or other retail operations who placed the "Subject Product" (as defined in Paragraph 17, p.5 below) into the stream of commerce in California which contains Di(2-ethylhexyl) phthalate ("DEHP") without first giving "clear and reasonable" warnings.

6. Defendants DOES 1-50 are named herein under fictitious names, as their true names and capacities are unknown to Plaintiff. Plaintiff is informed and believes, and thereon alleges, that each of said DOES has manufactured, packaged, distributed, marketed, sold and/or has otherwise been involved in the chain of commerce of, and continues to manufacture, package, distribute, market, sell, and/or otherwise continues to be involved in the chain of commerce of the Subject Product for sale or use in California, and/or is responsible, in some actionable manner, for the events and happenings referred to

1 herein, either through its conduct or through the conduct of its agents, servants or
2 employees, or in some other manner, causing the harms alleged herein. Plaintiff will seek
3 leave to amend this Complaint to set forth the true names and capacities of DOES when
4 ascertained.

5 7. Upon information and belief, at all times relevant to this action, each of
6 DOES 1-50, was an agent, servant, or employee of either of the Defendants. In conducting
7 the activities alleged in this Complaint, each of DOES 1-50 was acting within the course
8 and scope of this agency, service, or employment, and was acting with the consent,
9 permission, and authorization of the relevant Defendant. All actions of each of DOES 1-
10 50 alleged in this Complaint were ratified and approved by the relevant Defendant or its
11 officers or managing agent. Alternatively, each of the DOES 1-50 aided, conspired with
12 and/or facilitated the alleged wrongful conduct of the relevant Defendant.

13 **II** 14 **JURISDICTION AND VENUE**

15 8. This Court has jurisdiction over this action pursuant to California
16 Constitution Article VI, Section 10, which grants the Superior Court “original jurisdiction
17 in all causes except those given by statute to other trial courts.” This Court has jurisdiction
18 over this action pursuant to HSC § 25249.7, which allows enforcement of violations of
19 Proposition 65 in any Court of competent jurisdiction.

20 9. This Court has jurisdiction over Defendants because, based on information
21 and belief, Defendants are business entities having sufficient minimum contacts in
22 California, or otherwise intentionally availing themselves of the California market through
23 the sale, marketing, distribution and/or use of the Subject Product in the State of
24 California, to render the exercise of jurisdiction over Defendants by the California courts
25 consistent with traditional notions of fair play and substantial justice.

26 10. Venue is proper in the Alameda County Superior Court, pursuant to Code of
27 Civil Procedure (“CCP”) §§ 395 and 395.5, because this Court is a court of competent
28 jurisdiction, because one or more instances of wrongful conduct occurred, and continue to

1 occur, in Alameda County, and the cause of action, or part thereof, arises in Alameda
2 County because Defendants’ violations occurred (the Subject Product is marketed, offered
3 for sale, sold, used, and/or consumed without clear and reasonable warnings) in this
4 County. Furthermore, this Court is the proper venue under CCP § 395.5 and HSC §§
5 25249.7(a) and (b), which provide that any person who violates or threatens to violate HSC
6 §§ 25249.5 or 25249.6 may be enjoined in, and civil penalty assessed and recovered in a
7 civil action brought in, any court of competent jurisdiction.

8
9 **III**
STATUTORY BACKGROUND

10 11. The People of the State of California have declared in Proposition 65 their
11 right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or
12 other reproductive harm.” (HSC, Div. 20, Ch. 6.6 Note [Section 1, subdivision (b) of
13 Initiative Measure, Proposition 65]). Proposition 65 is classically styled as a “right-to-
14 know” law intended to inform consumers’ choices prior to exposure.

15 12. To affect this goal, Proposition 65 requires that individuals be provided with
16 a “clear and reasonable warning” before being exposed to substances listed by the State of
17 California as causing cancer or reproductive toxicity. HSC § 25249.6, which states, in
18 pertinent part:

19 “No person in the course of doing business shall knowingly and
20 intentionally expose any individual to a chemical known to the state
21 to cause cancer or reproductive toxicity without first giving clear and
22 reasonable warning to such individual...”

23 13. Proposition 65 requires the Governor of California to publish a list of
24 chemicals known to the state to cause cancer, birth defects, or other reproductive harm.
25 See HSC § 25249.8. The list, which the Governor updates at least once a year, contains
26 over 700 chemicals and chemical families. Proposition 65 imposes warning requirements
27 and other controls that apply to Proposition 65-listed chemicals.

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1 14. All businesses with ten (10) or more employees that operate or sell products in
2 California must comply with Proposition 65. Under Proposition 65, businesses are: (1)
3 prohibited from knowingly discharging Proposition 65-listed chemicals into sources of
4 drinking water (HSC § 25249.5), and (2) required to provide “clear and reasonable”
5 warnings before exposing a person, knowingly and intentionally, to a Proposition 65-listed
6 chemical (HSC § 25249.6).

7 15. Proposition 65 provides that any person who “violates or threatens to
8 violate” the statute “may be enjoined in any court of competent jurisdiction.” HSC
9 §25249.7(a). “Threaten to violate” is defined to mean creating “a condition in which there
10 is a substantial probability that a violation will occur.” HSC §25249.11(e). Violators are
11 liable for civil penalties of up to \$2,500 *per day for each* violation of Proposition 65. See
12 HSC §25249.7(b)(emphasis added).

13 **IV**
14 **BACKGROUND AND PRELIMINARY FACTS**

15 16. This action seeks to remedy the continuing failure of Defendants to clearly
16 and reasonably warn consumers in California that they are being exposed to DEHP, a
17 chemical known to the State of California to cause cancer, developmental toxicity, and
18 reproductive toxicity.

19 17. Defendants manufactured, packaged, distributed, marketed, sold and/or have
20 otherwise been involved in the chain of commerce of, and continue to manufacture,
21 distribute, package, promote, market, sell and/or otherwise continue to be involved in the
22 chain of the following consumer product which contains the chemical DEHP: 10 Piece
23 Mani Pedi Set, Style #PL-CPS1008-Pink Multi, GI120123, UPC198018077562 (plastic
24 case) (referred to herein as the “Subject Product”).

25 18. The Subject Product continues to be offered for sale, sold and/or otherwise
26 provided for use and/or handling to individuals in California.

27 19. The use and/or handling of the Subject Product causes exposures to DEHP at
28 levels requiring a “clear and reasonable warning” under Proposition 65. Defendants

1 expose consumers of the Subject Product to DEHP and have failed to provide the health
2 hazard warnings required by Proposition 65.

3 20. The past, and continued manufacturing, packaging, distributing, marketing
4 and/or sale of the Subject Product, without the required health hazard warnings, causes
5 individuals to be involuntarily exposed to high levels of DEHP in violation of Proposition
6 65.

7 21. Plaintiff seeks injunctive relief enjoining Defendants from the continued
8 manufacturing, packaging, distributing, marketing and/or selling of Subject Product in
9 California without first providing clear and reasonable warnings, within the meaning of
10 Proposition 65, regarding the risks of cancer, developmental harm and other reproductive
11 harm, posed by exposures to DEHP through the use and/or handling of the Subject
12 Product. Plaintiff seeks an injunctive order compelling Defendants to bring its business
13 practices into compliance with Proposition 65 by providing clear and reasonable warnings
14 to each individual who may be exposed to DEHP from the use and/or handling of the
15 Subject Product. Plaintiff also seeks an order compelling Defendants to identify and locate
16 each individual person who in the past has purchased Subject Product, and to provide to
17 each such purchaser a clear and reasonable warning that the use of the Subject Product, as
18 applicable, will cause exposure to DEHP.

19 22. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties
20 to remedy Defendants' failure to provide clear and reasonable warnings regarding
21 exposures to DEHP.

22 23. On January 01, 1988, the State of California officially listed DEHP as a
23 chemical known to cause cancer.

24 24. The No Significant Risk Level ("NSRL") for cancer as relating DEHP is 310
25 µg/day for adults.

26 25. The NSRL is calculated based on a body weight of 58 kg for an adult or
27 pregnant woman, 70 kg for an adult male, 40 kg for an adolescent, 20 kg for a child, 10 kg
28 for an infant, and 3.5 kg for a neonate (27 CCR § 25803, subd. (b)).

1 26. The exposure estimates from the Subject Product exceed the DEHP NSRL
2 set by the California Office of Environmental Health Hazard Assessment (“OEHHA”). As
3 a result, the Subject Product is required to have a clear and reasonable warning under
4 Proposition 65.

5 27. On October 24, 2003, the State of California officially listed DEHP as a
6 chemical known to cause developmental toxicity and male reproductive toxicity.

7 28. The Maximum Allowable Dosage Level (“MADL”) for reproductive harm,
8 and male reproductive harms, as relating to DEHP is the following for intravenous
9 exposures: 4200 µg/day for adults; 600 µg/day for infant boys, age 29 days to 24 months; and
10 210 µg/day for neonatal infant boys, age 0 to 28 days; and for oral exposures: 410 µg/day for
11 adults; 58 µg/day for infant boys, age 29 days to 24 months; and 20 µg/day for neonatal infant
12 boys, age 0 to 28 days.

13 29. The MADL is calculated based on a body weight of 58 kg for an adult or
14 pregnant woman, 70 kg for an adult male, 40 kg for an adolescent, 20 kg for a child, 10 kg
15 for an infant, and 3.5 kg for a neonate (27 CCR § 25803, subd. (b)).

16 30. The exposure estimates from the Subject Product exceeds the DEHP MADL
17 set by OEHHA. As a result, the Subject Product is required to have a clear and reasonable
18 warning under Proposition 65.

19 31. Plaintiff purchased the Subject Product without a Proposition 65 warning on
20 the Subject Product, or as required by Proposition 65.

21 32. To test the Subject Product for DEHP, Plaintiff engaged a well-respected and
22 accredited testing laboratory that used the testing protocol used and approved by the
23 California Attorney General.

24 33. The results of testing undertaken by Plaintiff of the Subject Product, shows that
25 the Subject Product tested was in violation of the 310 µg/day NSRL “safe harbor” daily limit
26 for DEHP set forth in Proposition 65’s regulations. As a result, the Subject Products are
27 required to have clear and reasonable warning under Proposition 65.

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1 34. The results of testing undertaken by Plaintiff of the Subject Product, shows that
2 the Subject Product tested was in violation of the MADL “safe harbor” daily limits for
3 DEHP set forth in Proposition 65 regulations at: 4200 µg/day for adults; 600 µg/day for
4 infant boys, age 29 days to 24 months; and 210 µg/day for neonatal infant boys, age 0 to 28
5 days, for intravenous exposures; and 410 µg/day for adults; 58 µg/day for infant boys, age 29
6 days to 24 months; and 20 µg/day for neonatal infant boys, age 0 to 28 days 310 µg/day, for
7 oral exposures. As a result, the Subject Product is required to have clear and reasonable
8 warning under Proposition 65.

9 35. As a proximate result of acts by the Defendants, as persons in the course of
10 doing business within the meaning of HSC §25249.11(b), individuals throughout the State
11 of California, including in the County of Alameda, have been exposed to DEHP without
12 clear and reasonable warnings. The individuals subject to exposures to DEHP include
13 normal and foreseeable users of the Subject Product, as well as all other persons exposed
14 to the Subject Product.

15 36. At all times relevant to this action, Defendants have knowingly and
16 intentionally exposed the users of the Subject Product to DEHP without first giving clear
17 and reasonable warnings to such individuals.

18 37. Individuals using the Subject Product are exposed to DEHP in excess of the
19 daily “no significant risk” levels determined by the State of California, as applicable for
20 DEHP.

21 38. Individuals using each Subject Product are exposed to DEHP in excess of the
22 “maximum allowable daily” levels determined by the State of California, as applicable for
23 DEHP.

24 39. At all times relevant to this action, Defendants have, in the course of doing
25 business, failed to provide individuals using and/or handling the Subject Product with clear
26 and reasonable warnings that the Subject Product exposes individuals to DEHP.

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V
**SATISFACTION OF PRIOR NOTICE OF PROPOSITION 65 VIOLATIONS AND
SIXTY (60) DAY INTENT TO SUE**

40. On or about March 30, 2024, Plaintiff gave 60-day notice of alleged violations of HSC §25249.6 (the “Notice”), filed as AG Number 2024-01311, concerning consumer product exposures subject to a private action, to each Defendant, the California Attorney General, County District Attorneys, and City Attorneys for each city containing a population of at least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the Subject Product, containing DEHP.

41. Before sending the Notice of alleged violations, Plaintiff investigated the consumer product involved, the likelihood that such product would cause users to suffer significant exposures to DEHP and the corporate structure of Defendants.

42. The Notice of alleged violations included a Certificate of Merit executed by the attorney for the noticing party, Plaintiff CCPG. The Certificate of Merit states that the attorney for Plaintiff who executed the certificate had consulted with at least one person with relevant and appropriate expertise who reviewed data regarding the exposures to DEHP, the subject Proposition 65-listed chemical related to this action. Based on that information, the attorney for Plaintiff who executed the Certificate of Merit believed there was a reasonable and meritorious case for this private action. The attorney for Plaintiff attached to the Certificate of Merit served on the Attorney General, the confidential factual information sufficient to establish the basis of the Certificate of Merit.

43. Plaintiff’s Notice of alleged violations also includes a Certificate of Service and documents entitled “Appendix “A” - The Safe Drinking Water & Toxic Enforcement Act of 1986 (Proposition 65): A Summary”, and “Appendix “B” - The Safe Drinking Water & Toxic Enforcement Act of 1986 (Proposition 65): Special Compliance Procedure”. HSC §25249.7(d).

44. The Notice was issued pursuant to, and in compliance with, the requirements of HSC § 25249.7, subdivision (d) and the statute’s implementing regulations regarding the

1 notice of the violations to be given to certain public enforcement agencies and to the
2 violator.

3 45. Plaintiff is commencing this action more than sixty (60) days from the date
4 that Plaintiff served the Notice to Defendants, and the public prosecutors referenced in the
5 paragraphs above.

6 46. Plaintiff is informed, believes, and thereon alleges that neither the Attorney
7 General, nor any applicable district attorney or city attorney has commenced an action or is
8 diligently prosecuting an action against either Defendant with respect to the Subject
9 Product.

10
11 **FIRST CAUSE OF ACTION**

12 **(Injunctive Relief for Violations of Proposition 65, The Safe Drinking Water and**
13 **Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))**

14 **(Against Defendants and Does 1 - 50)**

15 47. Plaintiff repeats and incorporates by reference Paragraphs 1 through 46,
16 inclusive, as if specifically set forth in this cause of action.

17 48. By committing the acts alleged in this Complaint, Defendants at all times
18 relevant to this action, and continuing through the present, have violated and continue to
19 violate HSC § 25249.6 by, in the course of doing business, knowingly and intentionally
20 exposing individuals, who use or handle the Subject Product, to the chemical DEHP at
21 levels exceeding allowable exposure levels under Proposition 65 guidelines without
22 Defendants first giving clear and reasonable warnings to such individuals pursuant to HSC
23 §§ 25249.6 and 25249.11(f).

24 49. Defendants have manufactured, packaged, distributed, marketed, sold and/or
25 have otherwise been involved in the chain of commerce of, and continue to manufacture,
26 package, distribute, market, sell and/or otherwise continue to be involved in the chain of
27 commerce of the Subject Product, which has been, is, and will be used and/or handled by
28 individuals in California, without Defendants providing clear and reasonable warnings,

1 within the meaning of Proposition 65, regarding the risks of cancer, developmental harm
2 and male reproductive harm, posed by exposure to DEHP through the use and/or handling
3 of the Subject Product. Furthermore, Defendants have threatened to violate HSC §25249.6
4 by the Subject Product being marketed, offered for sale, sold and/or otherwise provided for
5 use and/or handling to individuals in California.

6 50. By the above-described acts, Defendants have violated HSC § 25249.6 and
7 are therefore subject to an injunction ordering Defendants to stop violating Proposition 65,
8 and to provide warnings to consumers and other individuals who will purchase, use and/or
9 handle the Subject Product.

10 51. An action for injunctive relief under Proposition 65 is specifically authorized
11 by HSC § 25249.7(a) in any court of competent jurisdiction.

12 52. Continuing commission by Defendants of the acts alleged above will irreparably
13 harm consumers within the State of California, for which harm they have no plain, speedy,
14 or adequate remedy at law. In the absence of equitable relief, Defendants will continue to
15 create a substantial risk of irreparable injury by continuing to cause consumers to be
16 involuntarily and unwittingly exposed to DEHP through the use and/or handling of the
17 Subject Product.

18
19 **SECOND CAUSE OF ACTION**

20 **(Civil Penalties for Violations of Proposition 65, The Safe Drinking Water and Toxic
21 Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*)**

22 **(Against Defendants and Does 1 - 50)**

23 53. Plaintiff repeats and incorporates by reference Paragraphs 1 through 52,
24 inclusive, as if specifically set forth in this cause of action.

25 54. By committing the acts alleged in this Complaint, Defendants at all times
26 relevant to this action, and continuing through the present, have violated and continue to
27 violate HSC § 25249.6 by, in the course of doing business, knowingly and intentionally
28 exposing individuals who use or handle the Subject Products to the chemical DEHP at

1 levels exceeding allowable exposure levels without Defendants first giving clear and
2 reasonable warnings to such individuals pursuant to HSC §§ 25249.6 and 25249.11(f).

3 55. Defendants have manufactured, packaged, distributed, marketed, sold and/or
4 has otherwise been involved in the chain of commerce of, and continue to manufacture,
5 package, distribute, market, sell and/or otherwise continue to be involved in the chain of
6 commerce of the Subject Product, which has been, is, and will be used and/or handled by
7 individuals in California, without Defendants providing clear and reasonable warnings,
8 within the meaning of Proposition 65, regarding the risks of cancer, developmental harm
9 and male reproductive harm, posed by exposure to DEHP through the use and/or handling
10 of the Subject Product. Furthermore, Defendants have threatened to violate HSC §
11 25249.6 by the Subject Product being marketed, offered for sale, sold and/or otherwise
12 provided for use and/or handling to individuals in California.

13 56. By the above-described acts, Defendants are liable, pursuant to HSC § 25249.7(b),
14 for a civil penalty of up to \$2,500 per day, for each violation of HSC § 25249.6 relating to
15 the Subject Product (applying a 365 per day year, equals a maximum civil penalty amount
16 of \$912,500 for each violation).

17 57. Wherefore, Plaintiff prays judgment against Defendants, as set forth
18 hereafter.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff prays for relief against Defendants as follows:


- 21 1. A preliminary and permanent injunction enjoining Defendants, their
22 agents employees, assigns and all persons acting in concert or
23 participating with Defendants, from manufacturing, packaging,
24 distributing, marketing and/or selling the Subject Product, and any
25 related products, for sale or use in California without first providing
26 clear and reasonable warnings, within the meaning of Proposition 65,
27 that the users and/or handlers of the Subject Product are exposed to
28 the chemical DEHP;

2. An injunctive order, pursuant to HSC § 25249.7(b) and 27 CCR §§ 25603 and 25603.1, compelling Defendants to provide a “clear and reasonable” warning on the label of the Subject Product, and warnings online as required and applicable. The warning should indicate that the Subject Product will expose the user or consumer to chemicals known to the State of California to cause cancer, developmental harm, and reproductive harm.
3. An assessment of civil penalties against Defendants, pursuant to HSC § 25249.7(b), in the amount of \$2,500, per day, for each violation of Proposition 65;
4. An award to Plaintiff of its attorneys’ fees pursuant to CCP § 1021.5 or the substantial benefit theory;
5. An award of costs of suit herein pursuant to CCP § 1032 *et seq.* or as otherwise warranted; and
6. Such other and further relief as the Court may deem just and proper.

Respectfully submitted,

DATED: November 14, 2024

KHANSARI LAW CORPORATION



Andre A. Khansari, Esq.
Attorneys for Plaintiff,
CA Citizen Protection Group, LLC